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No. 86-1738

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

FRANCIS LACINA, DAVID GALBRAITH, BILL KNIGHT, GEORGE CRAIG, TED EDWARDS, CHARLES BEESON, DONALD EVANS, ROBERT BECK, LOU RESINGER, ANDREW ROGERS, BUCK GERMANY, DAN KELLY, MARVIN GATES, WILBURT BOND, WILLIAM GONZALES, LESTER DIXON, FRANK MATNEY and RICK BERNAS,
Petitioners,

vs.

G-K TRUCKING, GENERAL CABLE, PENN-CENTRAL CORP., G-K TECHNOLOGIES, EASTERN CARRIERS and ROBERT JENSEN,
Respondents.

ON PETITION
FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the six-month statute of limitations for actions brought pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185(a), satisfied by a mistaken, unsuccessful attempt to file a complaint?

LIST OF PARENT COMPANIES, SUBSIDIARIES AND AFFILIATES

A list of parent companies, subsidiaries and affiliates of respondents GK Trucking Corp., General Cable, Penn Central Corporation and GK Technologies, Incorporated is attached hereto as Appendix "A".

TABLE OF CONTENTS

Page

QUESTION PRESENTED

TABLE OF AUTHORITIES ii

OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

CONCLUSION 5

APPENDIX "A"
LIST OF PARENT COMPANIES,
SUBSIDIARIES AND AFFILIATES

TABLE OF AUTHORITIES

Page

Cases

Del Costello v. International
Brotherhood of Teamsters
462 U.S. 151 (1983) 1, 4

Gallon v. Levin Metals Corp.
799 F.2d 1439 (9th Cir. 1986),
petition for cert. filed,
54 U.S.L.W. 3763 (U.S. May 7, 1986) 4, 5

West v. Conrail
No. 85-1804 (U.S. April 6, 1987) 1-5

Federal Statutes

Labor Management Relations Act of 1947
Section 301, 29 U.S.C. § 185(a) 2, 3

Federal Rules of Civil Procedure Rule 3 ..... 4, 5

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STATEMENT OF THE CASE

The petition for certiorari attempts to escape a routine application of *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983), by misapplying *West v. Conrail*, No. 85-1804 (U.S. April 6, 1987), to dictum

contained in a footnote in the Ninth Circuit opinion in the present case. Certiorari would serve no useful or appropriate purpose and should be denied.

The district court granted summary judgment in favor of respondents on the ground that petitioners' action under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. § 185, is barred by the six-month statute of limitations applicable to such actions. That decision was affirmed by the Court of Appeals for the Ninth Circuit. 802 F.2d 1190 (9th Cir. 1986).

Significantly, the Court of Appeals' opinion deals almost exclusively with the issue of when the statute of limitations with respect to the Section 301 complaint *commenced* running. The Ninth Circuit held that the district court correctly decided that the petitioners knew or should have known that the statute of limitations began running more than six months before their complaint was filed. Almost as an afterthought, the Court of Appeals pointed out in a footnote that an earlier, futile attempt to file a complaint did not satisfy the statute of limitations since that complaint was neither filed nor served in a timely manner.

Petitioners now seek to overturn the Ninth Circuit's decision by promoting this passing statement in a footnote to an issue worthy of certiorari. According to petitioners, the question before this Court is whether the rulings below are in conflict with this Court's recent decision in *West v. Conrail*, No. 85-1804 (U.S. April 6, 1987). In *West*, the Court held that a timely-filed Section 301 complaint need not also be served within six months in order to satisfy the statute of limitations.

In the present case, *the complaint was neither filed nor served* within the applicable six-month limitation period. Petitioners mistakenly attempted to file a complaint on a date arguably before the expiration of the limitation period, but it was rejected by the district court clerk for failing to

comply with the Federal Rules of Civil Procedure. On petitioners' second attempt, the complaint was filed, but that filing was indisputably outside the six-month limitation period. The district court held that the aborted first attempt to file did not satisfy the statute of limitations, and the Ninth Circuit affirmed.

Thus, petitioners' basic assumption — that this case presents the identical question resolved by the Court in *West* — is inaccurate. Here, unlike *West*, the complaint before the district court and the Ninth Circuit was itself untimely filed. There is thus no question of applying *West* to forgive untimely service of a complaint which was timely filed. The decision of the Court of Appeals is not in conflict with *West*, and does not depend on the rationale *West* rejected, but instead involves unique circumstances which are not likely ever to be repeated and which plainly do not warrant granting certiorari.

REASONS FOR DENYING THE WRIT

Petitioners assert that the Court's recent decision in *West v. Conrail*, No. 85-1804 (U.S. April 6, 1987), undermines the reasoning upon which the judgment of the Court of Appeals rests, and requires that that judgment be vacated and the case remanded for further consideration. They contend that the Court of Appeals' footnote statement that a complaint brought pursuant to Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C § 185(a), must be filed *and served* within six months is no longer valid in light of *West*. This argument presumes that, as in *West*, the Ninth Circuit dismissed this Section 301 action because of the petitioners' failure to serve within six months an otherwise timely complaint.

In fact, the instant case is not disturbed by *West v. Conrail*. In *West*, it was undisputed that the Section 301

complaint was filed timely under Fed.R.Civ.P.3 because it was filed *less* than six months after the statute of limitations began to run. That *same* complaint was mailed to the defendants 16 days later, but more than six months after the statute began to run. Based on this straightforward set of facts, the Court held that where the complaint was timely under Fed.R.Civ.P. 3, there was no requirement to both file *and serve* the complaint within the six-month limitation period established in *Del Costello v. International Brotherhood of Teamsters*, 462 U.S. 151 (1983).

By contrast, the case at hand involves a different factual pattern that is unique and unlikely ever to recur. Here, a law clerk for petitioners' counsel *mistakenly* attempted to file a complaint on November 10, 1982 — a date arguably within the six-month limitation period. 802 F.2d 1190, 1192 n.2. That complaint was returned to petitioners' counsel by the district court clerk because it did not comply with the Federal Rules of Civil Procedure in several respects. No attempt was made to refile or serve that complaint for 23 days.

Instead, on December 3, 1982 — after the expiration of the *Del Costello* limitations period — petitioners filed the complaint and served this pleading on respondents. The petitioners thus now claim that an untimely *filed* complaint commenced this action. Unlike *West v. Conrail*, this case does not involve a complaint that was filed before the expiration of the statute of limitations and then served after the six months had run. Rather, it involves the highly unusual situation of a mistaken attempt to file a complaint, a rejection by the court clerk of that complaint and no attempt whatever to refile that complaint in a timely manner.

The Court of Appeals' footnote reference to *Gallon v. Levin Metals Corp.*, 779 F.2d 1439 (9th Cir. 1986), *petition for cert. filed*, 54 U.S.L.W. 3763 (U.S. May 7, 1986), and

the holding in the case that a complaint must be filed *and served* within six months is therefore plainly dictum. 802 F.2d 1190, 1192 n.2. Because the holding of *West v. Conrail* applies only to situations where a timely-filed complaint is served after the six months elapses, and because the *only* complaint that was ever filed and served to commence the instant case was the December 3, 1982 complaint, the Court of Appeals' decision was not dependent on *Gallon*. Neither *Gallon* nor *West* overrule Fed. R. Civ. P.3 to hold that an unfiled and unserved complaint satisfies the statute of limitations.

Thus missing from this case is any ground warranting the granting of the petition for certiorari. The Court of Appeals' decision is not in conflict with *West v. Conrail*, nor does it present an important issue requiring this Court's resolution. Rather, the case involves a unique set of circumstances that is not likely to be repeated and which have no significance to anyone other than the parties hereto.

CONCLUSION

For these reasons, the Petition for Writ of Certiorari should be denied.

Dated: May 27, 1987

Respectfully submitted,

GIBSON DUNN & CRUTCHER

DAVID A. CATHCART
WILLIAM D. CLASTER

APPENDIX "A"

PENN CENTRAL TELECOMMUNICATIONS COMPANY

The Penn Central Corporation ..... Pennsylvania
Pennsylvania Company ..... Delaware
GK Technologies, Incorporated ..... New Jersey
Penn Central Telecommunications Company ..... Delaware
Engineering and Technical Services, Inc. ..... Florida
G & H Technology, Inc. (ownership in process) ..... Delaware
Indiana Steel & Wire Company ..... Delaware
Canadian Puregas Equipment, Limited ..... Ontario
General Cable Corporation ..... Delaware
General Cable Holdings, Inc. ..... California
GK Technologies of Canada Ltd. ..... Ontario
Gencab of Canada Limited ..... Ontario
GK Trucking Corp. ..... Delaware
Network Distribution Services, Inc. ..... Delaware
Telsta Network Services, Inc. ..... Delaware
Tri-State Utility, Inc. ..... California
General Cable International, Inc. ..... Connecticut
General Cable Export Corp. ..... New York
General Cable International Operations Limited ..... Connecticut
GK Export Corp. ..... Connecticut
Electrofinance Limited[1] ..... Cayman Islands
Forest Ltda. Fabrica de Condutores Eletricos ..... Brazil

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(1) 50% owned by Marathon LeTourneau Offshore Pty. Ltd. and 50% owned by GK Technologies, Incorporated.

Industria Venezolana de Cables Electricos S.A.[2]	Venezuela
Ceat General de Colombia S.A.[3]	Colombia
Cobres de Colombia S.A.[4]	Colombia
General Cable Compania S.A.[5]	Spain
Cables de Comunicaciones, S.A.[6]	Spain
Plasmica S.A.[7]	Spain
Saenger S.A.[7]	Spain
Depositos y Servicios-Madrid S.A.	Spain
Depositos y Serivicios S.A.	Spain
Depositos y Servicios-Bilbao S.A.	Spain
Conductores Electricos Roque S.A.[8]	Spain
Navarro S.A.[9]	Spain
General Cable Overseas N.V.	Netherlands Antilles

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(2) 92.8% owned by Electrofinance Limited.

(3) 50% owned by GK Technologies, Incorporated.

(4) 33.3% owned by Ceat General de Colombia

(5) 50% owned by Pennsylvania Company and 50% owned by GK Technologies, Incorporated.

(6) 2% owned by Plasmica S.A. and 49% by General Cable Compania S.A.

(7) 50% owned by General Cable Compania S.A., 25% owned by Pennsylvania Company and 25% owned by GK Technologies, Incorporated.

(8) 30% owned by General Cable Compania S.A.

(9) 33.3% owned by General Cable Compania S.A. and 33.3% owned by Roque